



Commonwealth of Massachusetts State Ethics Commission

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FINANCIAL DISCLOSURE OPINION EC-FD-93-1

FACTS:

You represent two county deputy sheriffs, appointed to conduct service of process within the county. Under G.L. c.37, §3, a sheriff may appoint deputy sheriffs, who serve at the pleasure of the sheriff. The sheriff has stated to us that he expressly authorized these two deputy sheriffs to perform the civil service of process duties of his department. According to the sheriff, the deputy sheriffs do not report to him on a daily basis, but he retains the power to revoke a deputy sheriff's commission and has oversight and responsibility for service of process by the deputies in his county. See, G.L. c.37, §2. The sheriff has stated that the two deputy sheriffs have discretion concerning how to implement these duties, provided that the civil process serving is conducted within the confines of the law. However, if problems arise, such as issues concerning the conduct of a deputy sheriff's official duties or whether service of process is being implemented within the confines of the law, or the appointment of new deputy sheriffs, these two deputy sheriffs are accountable to him.

The two deputy sheriffs whom you represent formed a private corporation (Corporation) to serve process, and serve as president and treasurer. You estimate that the division of work between the two deputy sheriffs is 50-50 and that they manage the business and share responsibility equally. The Corporation is funded entirely by the fees received from serving process and other duties from which deputy sheriffs may receive a fee. You state that these two deputy sheriffs draw a salary from the Corporation.^{1/} The employees do not participate in any county benefits system, such as life insurance, retirement, and deferred compensation. The corporation does not receive money from the county treasury and does not use county office space.

The chairman of the county commissioners, pursuant to G.L. c. 268B, §3(j)(11),^{2/} has designated one of these deputy sheriffs as an individual in a major policy making position who is required to file a Statement of Financial Interest (SFI) with the Commission.^{3/} You argue that these deputy sheriffs are not public employees and should not be required to file SFIs because, although they are appointees of the sheriff, they are not employees, do not occupy policy making positions with the sheriff, and receive no compensation from the sheriff or the county treasury. You state that they "operate a private business corporation funded entirely through the provision of professional services to private individuals and business entities."

QUESTION:

Was this deputy sheriff properly designated to file a Statement of Financial Interests for calendar years 1991 and 1992?

ANSWER:

Yes.

DISCUSSION:

G.L. c. 268B, §5(c) provides that:

Every public employee shall file a statement of financial interests for the preceding calendar year with the commission within thirty days after becoming a public employee, on or before may first of each year thereafter that such person is a public employee and on or before may first of the year after such person ceases to be a public employee...

For purposes of §5(c) the Commission has defined the term “public employee” as

Any person holding a major policy making position in a governmental body for thirty days or more during a reporting year whether by election, appointment, contract of hire or engagement, and whether on a full, part-time, intermittent, or consultant basis, excluding any person who serves on a board, commission or council which has no authority to expend public funds other than to approve reimbursements for expenses and excluding any person who receives no compensation other than reimbursement for expenses. 930 CMR 2.02 (15), See G.L. c. 268B, §1(o).

The Legislature has determined that, among others, a state or county employee whose salary equals or exceeds that of a state employee classified in step one of job group XXV in the general salary schedule contained in section forty-six of chapter thirty (currently \$34,972.08) and who reports directly to the executive or administrative head of a government agency is an individual who holds a major policy making position in a governmental body^{4/} and who must file a Statement of Financial Interest. G.L. c. 268B, §1(l). *See also 930 CMR 2.02(12).*

In determining whether the deputy sheriff is required to file an SFI, the Commission considers the relevant question to be whether the deputy sheriff is a public employee under c. 268B, not whether the deputy sheriff is required to file as the President of a private corporation. The Commission finds that, under c. 268B, the deputy sheriff was properly designated to file an SFI.

For purposes of G.L. c. 268B, the sheriff’s department is a governmental body and the sheriff is the executive or administrative head. The sheriff is also the appointing authority for the deputy sheriffs and has overall responsibility for service of process by the deputies in his county and for all official acts of the deputies whom he appoints. See, G.L. c. 37, §2, 3 (sheriff responsible for the official acts of his deputies). By expressly authorizing these two deputy sheriffs to carry out the serving of legal process in the county, including subpoenas and other court documents, the sheriff has delegated a duty of the sheriff’s office to his deputy sheriffs. It does not follow, either from the private nature of the Corporation, or from the manner in which power to serve process is delegated, that the principals of the Corporation are not directly reportable to the sheriff. To the contrary, we note that when an issue arises concerning an alleged breach of a deputy sheriff’s duty, or whether service of process is being conducted properly, within the confines of the law, the two deputy sheriffs answer directly to and are accountable to the sheriff. There is no intermediate person to whom they would answer in the chain of command. We do not find it dispositive that these deputy sheriffs are not required to report to the sheriff on a daily basis. On the basis of the sheriff’s authority and the lack of an intermediary level of management, we conclude that the deputy sheriffs do report to the executive or administrative head of a government body. Accordingly, since he receives a salary^{5/} in excess of \$34,972.08, the deputy sheriff holds, by appointment^{6/}, a major policy making position. Thus, he is required to file an SFI during the years in which he was designated to file an SFI.

In reaching this conclusion, we also note that the position of deputy sheriff is a governmental appointment which requires the appointee to take an oath of office (G.L. c. 37, §3); that a deputy sheriff’s duties and fees are fixed by statute (G.L. c. 37, §11; G.L. c. 220, §6; G.L. c. 262, §8); and that the deputy sheriff is required to make a yearly accounting to the county treasurer of all fees collected (G.L. c. 262, §8A). *See Finance Commission of Boston v. Basile*, 354 Mass. 188, 192 (1968) (“fees and expenses charged by deputy sheriffs have a reasonable relation to the finances and methods of administration of the city and of the county ... fees for service of process might otherwise be made payable into the city treasury and any excess enure to its benefit”). Therefore, we do not accept the argument that the deputy sheriff is merely functioning as the officer in a private corporation.

We also do not agree with your contention that the deputy sheriff’s situation is analogous to that described in a recent court opinion, *Massachusetts Bay Transportation Authority Retirement Board v. State Ethics Commission*, 414 Mass. 582 (1993) (hereinafter *MBTA*). In *MBTA*, the Supreme Judicial Court concluded that, for purposes of G.L. c. 268A, §1(p), the MBTA Retirement Board was not a state agency because it lacked sufficient indicia of control, governmental function, governmental creation, and public funding in order to have the requisite direct tie with the Commonwealth. *Id.* at pp.588-593. We believe that *MBTA* is inapposite to the situation before us. First, the test for whether an organization is a state agency for purposes of G.L. c. 268A is not the test for determining whether an employee has been properly designated to file an SFI under c. 268B.

Second, unlike *MBTA*, where the Court found no direct tie to government, in the deputy sheriff's situation, the corporation is integrally tied to the government. Public employee status is derived from the deputy sheriff's appointment and statutory obligations and powers.^{7/} Unlike the MBTA Board, the corporation cannot function in the absence of the deputy sheriffs' statutory appointment, which gives the individuals the legal power to serve process. Without this appointment and these powers, no one in the corporation may serve process, nor may the corporation conduct the business of serving process. Use of the corporate form by the deputy sheriff in order to carry out civil process serving is merely a tool to implement a governmental function.^{8/}

You argue that the deputy sheriffs are exempt from the filing requirements because they do not expend public funds. Pursuant to G.L. c. 268B, §1(o), however, the issue is whether the governmental body which they serve (here, the sheriff's department) expends public funds. Further, 930 CMR 2.02 (15) only exempts from the definition of public employee those persons who serve on a council, commission or board which has no authority to expend public funds. The deputy sheriffs do not serve on such a council, commission or board.

Additionally, you argue that the deputy sheriffs are exempt since they are not paid directly from the county treasury, but the financial disclosure law does not require that one's compensation be paid directly from public monies. See generally, c. 268B, §1(l); 930 CMR 2.02 (17); *EC-FD-85-2*. In *EC-FD-85-2*, we concluded that two individuals who served the county, but who were compensated by a private corporation, were required to file SFIs because of the policy positions they held within the institution and the authority they possessed to expend public funds.

In addition to the analysis above, we note that, pursuant to G.L. c. 268B, §1(l), and 930 CMR 2.2(12), the deputy sheriffs must file SFIs if they are "person[s] exercising similar authority"^{9/} to the head of a division, bureau, or other major administrative unit within a governmental body. We find the deputy sheriffs fit within this definition. In essence, the sheriff has delegated his responsibility for service of process to these deputy sheriffs, a function of the sheriff's office which may otherwise be organized as a department of the sheriff's office.^{10/} Therefore, the deputy sheriffs are "person[s] exercising similar authority."

The designation of these deputy sheriffs comports with the purpose of c. 268B. The Financial Disclosure law was enacted "to assure the public of the impartiality and honesty of its public officials." *EC-FD-85-2*. Those public employees required to file include those who are presumably in a position to make policy or expend public funds. The deputy sheriffs have a policy making role where the sheriff has delegated a statutory function (service of process) to the deputy sheriffs and has given the deputy sheriffs the discretion to carry out and administer the function.

In conclusion, the deputy sheriff was properly designated as a public employee under G.L. c. 268B, §1(o) for purposes of filing SFIs for calendar years 1991 and 1992. Both deputies must file their SFIs within thirty (30) days of receipt of this opinion.

DATE AUTHORIZED: August 9, 1993

^{1/}You acknowledge that the salary is in excess of \$34,972.08. See discussion, *infra*.

^{2/}Under c. 268B, §3(j)(11), the chairman of the county commissioners in each county, not the sheriff, is required to submit a list of all major policy making positions.

^{3/}Although our records do not indicate that your other client has been designated to file an SFI, this opinion will apply equally to him.

^{4/}"Governmental body" means any state or county agency, authority, board, bureau, commission, council, department, division, or other entity, including the general court and the courts of the commonwealth. G.L. c. 268B, §1(h).

^{5/}The Ethics Commission, in 930 CMR 2.02(17), has defined the term salary to mean "the salary, wages or other compensation authorized for the reporting year equals or exceeds the salary in effect on January 1st of the reporting year for step one of job group XXV...."

^{6/}For purposes of c. 268B, it is not necessary for an individual to have a traditional employment arrangement with a government body. Under 930 CMR 2.02 (15) an individual may serve by election, appointment, contract of hire or engagement on a full, part-time,

intermittent or consultant basis(emphasis added). *See, EC-FD-85-2.*

⁷We note that this conclusion is consistent with Commission precedent that elected and appointed constables (who may also legally serve process) are municipal employees under the conflict of interest statute. *See EC-COI-86-10; 86-8; 82-59.*

⁸For purposes of this opinion, we do not find it necessary to decide whether the corporation is an instrumentality of the County. It is sufficient that the principals of the corporation are performing services for the Sheriff's Department, a county agency. *See EC-FD-85-2.*

⁹Exercising similar authority means "exercising authority on more than an occasional basis or for more than eight consecutive days which is qualitatively or quantitatively similar to, or the same as, that of the executive or administrative head or heads of a governmental body, a member of the judiciary, a person whose salary equals or exceeds that of a state employee classified in step one of job group XXV of the general salary schedule contained in M.G.L. c. 20, §46 and who reports directly to said executive or administrative head, or the head of a division, bureau, or other major administrative unit within a governmental body, except that no person shall be deemed to be exercising authority similar to that of another person merely by virtue of acting in the place of that other person during his or her normal vacation or sick leave periods." 930 CMR 2.02(7).

¹⁰We take notice that the sheriff of Suffolk County has organized the process serving function in a separate division within his office. The chief deputy sheriff in charge of process serving in Suffolk County has been designated as a public employee who must file an SFI.